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August 16, 2010

By Electronic Filing

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street SW
Washington, DC 20554

Re: *In the Matter of Implementation of Section 224 of the Act* (WC Docket No. 07-245); *A National Broadband Plan for Our Future* (GN Docket No. 09-51)

Dear Secretary Dortch:

Please find attached for filing in the above-referenced proceedings the initial comments Ameren Services Company, CenterPoint Energy Houston Electric, LLC, and Virginia Electric and Power Company, together, the Pole Owners Working for Equitable Regulation ("POWER") Coalition, on the Commission's Further Notice of Proposed Rulemaking, dated May 20, 2010.

Please feel free to contact the undersigned at (202) 828-5873 if you have any questions, or require further information.

Respectfully submitted,

Brett Heather Freedson

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act	)	WC Docket No. 07-245
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	

COMMENTS OF AMEREN SERVICES COMPANY, CENTERPOINT ENERGY HOUSTON ELECTRIC, LLC AND VIRGINIA ELECTRIC AND POWER COMPANY

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Dated: August 16, 2010

EXECUTIVE SUMMARY

Ameren Services Company, CenterPoint Energy Houston Electric, LLC, and Virginia Electric and Power Company, together, the Pole Owners Working for Equitable Regulation ("POWER") Coalition, strongly oppose the rate calculation methodology presented in the Further Notice of Proposed Rulemaking ("FNPRM") for telecommunications attachments, and various proposals by the Commission that would enable attachers to collect substantial compensatory damage awards for inconsequential delays in the make-ready process, or for contract terms and conditions determined by the Commission to be unjust or unreasonable several years after being voluntarily ratified by an attacher. Therefore, as to these issues, the POWER Coalition supports and adopts the positions of the Edison Electric Institute ("EEI") and the Utilities Telecom Council ("UTC"), and adds herein its own claims that the Commission's proposal to award compensatory damages is contrary to Section 224 of the Act and the Constitution. The POWER Coalition also submits these additional comments on issues specific to their respective operations.

In the event the Commission decides to impose rigid time frames for the various phases of survey and make-ready work (and it should not do so), any such framework adopted by the Commission must be flexible enough to permit reasonable adjustments for certain circumstances beyond the control of the pole owner that may postpone or interrupt its performance of any pole access request. At a minimum, the Commission's final rule must include provisions that excuse, suspend, or modify the timeline for reasons of: (1) an incomplete or inaccurate application submitted by the attacher; (2) a determination by the pole owner that replacement of an existing pole is needed to complete the access request; (3) an access request exceeding the maximum number of attachments allowed per individual permit application; (4) unforeseen circumstances

that interrupt survey or make-ready work; and (5) delays arising from coordination with existing attachers.

As EEI, UTC, and several individual member utilities have demonstrated to the Commission in this proceeding, wireless attachments raise substantially more complex engineering, safety, and reliability challenges than the linear attachments used by cable and telecommunications companies. Therefore, wireless pole access requests are best handled in accordance with the current regime of negotiated arrangements, and should not be governed by any Commission-imposed time frames that may be adopted for wired attachments.

The use of outside contractors to complete make-ready work should be permitted only if the pole owner fails to perform such work within the time frames prescribed by the Commission, and in that event, only as specifically directed by the pole owner. Of particular importance, the pole owner must be accorded discretion to select contractors who are approved to work on its poles. However, under no circumstances should the pole owner be obligated to allow such outside contractors to perform make-ready work among the electric lines.

The use of attachment techniques such as boxing and bracketing is not permitted by any member of the POWER Coalition, as a general matter, because they interfere with pole replacements, and inhibit the ability of authorized workers to climb the poles. Nevertheless, there are circumstances under which these techniques may be allowed, and the POWER Coalition supports a negotiation process between the pole owner and attachers to provide some guidance as to when the use of these techniques might be considered. The pole owner, however, must always be entitled to make the final determination as to whether any attachment technique would adversely affect any aspect of the safety, reliability, or engineering of its network.

The Commission's proposal that pole owners compile and publish a comprehensive price list for make-ready tasks would be unworkable, as it is not possible to identify *all* potential tasks, under all circumstances. Although members of the POWER Coalition are agreeable to providing the costs of typical make-ready tasks, these estimates must not be binding, and certain adjustments must be permitted, as needed to account for variations that arise as to each specific pole access request. Moreover, pole owners must be permitted to demand full payment of the costs associated with make-ready work in advance of commencing any pole access request, as is typically required for private party construction in the state tariffs of electric distribution utilities.

The POWER Coalition urges the Commission to follow the lead of several states that have adopted pole attachment regulations, and hold moderated workshops and other collaborative efforts to develop consensus pole attachment regulations to the extent possible.

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COMMENTS OF AMEREN SERVICES COMPANY, CENTERPOINT ENERGY HOUSTON ELECTRIC, LLC AND VIRGINIA ELECTRIC AND POWER COMPANY

Ameren Services Company, CenterPoint Energy Houston Electric, LLC, and Virginia Electric and Power Company, together, the Pole Owners Working for Equitable Regulation ("POWER") Coalition, through their undersigned counsel and pursuant to the Further Notice of Proposed Rulemaking ("FNPRM") in the above-captioned proceeding,[1] submit these comments on the proposed rules and policies currently before the Federal Communications Commission ("FCC" or "Commission") regarding the treatment of pole attachments. The members of the POWER Coalition each are investor-owned electric distribution utilities, and pole owners within their respective geographic service areas.

Ameren Services Company ("Ameren") is a service subsidiary of Ameren Corporation, and files these comments on behalf of itself, and its four utility operating subsidiaries: Ameren Corporation (Union Electric Company d/b/a AmerenUE), Central Illinois Light Company d/b/a AmerenCILCO, Illinois Power Company d/b/a AmerenIP, and Central Illinois Public Service Company d/b/a AmerenCIPS. Together, Ameren's operating companies provide electric power service to over 2.4 million consumers, throughout a 64,000 square mile service territory within Missouri and Illinois, and maintain over 9,500 employees.

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[1] *In the Matter of Implementation of Section 224 of the Act* (WC Docket No. 07-245), *A National Broadband Plan for Our Future* (GN Docket No. 09-51), Order and Further Notice of Proposed Rulemaking, FCC 10-84 (rel. May 20, 2010) ("FNPRM").

CenterPoint Energy Houston Electric, LLC ("CenterPoint") is an electric distribution and transmission subsidiary of CenterPoint, Inc., serving over 2.1 million consumers, within a 5,000 square mile service area around greater Houston.

Virginia Electric and Power Company does business in Virginia and North Carolina, as Dominion Virginia Power and Dominion North Carolina Power, respectively ("Dominion"), and provides service to over 2.4 million electric power consumers, using more than 54,000 miles of distribution lines. Dominion maintains over 7,100 employees.

I. INTRODUCTION

The FNPRM presents a momentous opportunity; not simply for industry participants to continue their fourteen-year-old battle over the costs and conditions of mandatory infrastructure access, and not simply for the Commission to bolster the rights of communications attachers seeking to provide broadband service. Instead, this proceeding is an opportunity for all stakeholders – the Commission, electric utilities, and communications service providers – to achieve the right balance of regulations that not only advance the national interest of providing advanced services to the greatest number, but also advance the national interest of ensuring that our critical infrastructure remains safe and reliable. The critical infrastructure at the heart of this proceeding is the lifeline for *both communications networks and the power grid.*

This is a critical moment in time for the operation, regulation, and growth of our nation's electric distribution facilities. The United States Senate Committee on Homeland Security has recognized these facilities as "critical infrastructure," and has underscored the vital role that electric utilities play in operating, managing, and restoring both electric and communications critical infrastructure. The Committee's *Katrina Report* characterized critical infrastructure as "systems and assets... so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security,

national public health or safety, or any combination of those matters."[2] Furthermore, the *Katrina Report* urged the owners of critical infrastructure, the federal government, and state governments to work *collaboratively* on the issues of managing and preserving the integrity and reliability of the nation's critical infrastructure.[3]

More recently, other federal government agencies have expressed concerns regarding the national security interests implicated by electric grid infrastructure. In particular, the Department of Energy has warned that the computer systems responsible for managing the electric grid are vulnerable to cyber attacks.[4] Similarly, the National Security Agency has responded to cybersecurity threats to critical infrastructure through the launch of its "Perfect Citizen" program, using sensors deployed in critical infrastructure, including the electric grid, to warn of impending cyber attacks.[5]

Informed by almost two centuries of experience, and now by these current observations at this key moment in time, the POWER Coalition objects to the proposals by the Commission that would limit the ability of pole owners to manage and preserve the safety, security, reliability, and operation of their electric infrastructure. Regulations impacting make-ready deadlines must remain flexible, and all determinations relating to construction on electric distribution poles must remain subject to the pole owner's informed discretion. Moreover, the fees charged by pole owners for access, rents, and construction cannot be calculated to subsidize communications attachers, while forcing electric utilities to operate and manage their critical infrastructure on a shoe-string budget.

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2 Hurricane Katrina: A Nation Still Unprepared, S. Rpt. 109-322 (2006).

3 *Id.*

4 *See, e.g.*, NSTB Assessments Summary Report: Common Industrial Control System Cyber Security Weaknesses INL/EXT-10-18381 (May 2010), available at http://www.fas.org/sgp/eprint/nstb.pdf.

5 U.S. Plans Cyber Shield for Utilities, Companies, Wall Street Journal, July 8, 2010 available at http://online.wsj.com/article/SB10001424052748704545004575352983850463108.html#printMode.

The members of the POWER Coalition therefore submit these comments on the issues having the most particularized impact on their operations. In addition, the POWER Coalition supports and adopts the positions of the Edison Electric Institute ("EEI") and the Utilities Telecom Council ("UTC"). EEI, UTC, and the POWER Coalition strongly oppose the rate calculation methodology presented in the FNPRM for telecommunications attachments, and the various proposals by the Commission that would enable attachers to collect substantial compensatory damage awards for inconsequential delays in the make-ready process, or for contract terms and conditions determined by the Commission to be unjust or unreasonable several years after being voluntarily ratified by an attacher.

II. THE PROPOSED TIMELINE FOR ACCESS TO POLE ATTACHMENTS MUST ACCOMMODATE ALL CIRCUMSTANCES BEYOND THE CONTROL OF THE POLE OWNER

The members of the POWER Coalition do not oppose the timeline for pole attachment access set forth in the FNPRM and the Commission's proposed Rule 1.1420, and in fact, under most circumstances, they complete all survey and make-ready for wired attachments consistent with this framework. However, in the interest of fairness, any timeline adopted by the Commission must be sufficiently flexible to permit reasonable adjustments for certain circumstances beyond the control of the pole owner that may postpone or interrupt survey or make-ready work. Accordingly, as discussed more fully below, the Commission's final rule must include provisions that excuse, suspend, or modify the timeline for reasons of: (1) incomplete or inaccurate information submitted by the attacher; (2) a determination by the pole owner that replacement of an existing pole is needed to complete the access request; (3) an access request exceeding the maximum number of attachments allowed per individual permit application; (4) unforeseen circumstances that interrupt survey or make-ready work; and (5) delays arising from coordination with existing attachers.

A. The Timeline Should be Triggered Only by a Complete and Accurate Permit Application

To begin the work of surveying its infrastructure, the pole owner requires certain detailed information about the proposed attachments that is exclusively within the control of the attacher. Each of the POWER Coalition members communicates its basic informational requirements to prospective attachers through its readily-available permit application materials.[6] Although individual permit application requirements vary among individual pole networks, the POWER Coalition has identified the following common data points: location of the pole for which access is requested, including pole identification number and map; size, type, and use of the proposed attachment (*i.e.*, cable attachment or telecommunications attachment); tension of cable; and power supply requested. If the prospective attacher submits a permit application to the pole owner that is both complete and accurate, no further information is needed or requested by the pole owner to complete the survey process, and such work is completed within the forty-five (45) day time frame to approve or deny access, as established by the Commission's current rules.[7] However, in the event the prospective attacher fails to include in its permit application any of the specific information requested by the pole owner, or provides data that later proves to be incorrect, the survey process cannot proceed; and the application must be returned to the prospective attacher, amended, and submitted anew.

During the survey phase of the pole attachment process, the members of the POWER Coalition have observed that substantial delays most often are attributable to the prospective attacher failing to promptly correct and re-submit an application rejected as incomplete or

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[6] Each of the Joint Commenters offers to its prospective attachers standard application materials, including forms, instructions for completion of the permit application, instructions for preparation of required maps and exhibits, description of applicable fees, if any, and an overview of the pole attachment process. CenterPoint maintains its application materials on its website: http://www.centerpointenergy.com/services/andmore/poleattachments/applyingforattachments. Ameren and Dominion provide such items immediately upon request by the prospective attacher.

[7] *See* 47 C.F.R. § 1.1403(b).

inaccurate. In fact, despite receiving immediate written notification of such rejection, prospective attachers may take weeks or months to renew their access requests, and some will never do so. The Commission should not hold pole owners responsible for time lapses caused by prospective attachers that ultimately postpone the start of the survey process.

Consistent with the FNPRM, any rule ultimately adopted by the Commission must make clear that a request for access sufficient to trigger the timeline for survey work is a "complete application that provides the [pole owner] with the information necessary to begin to survey the poles," as determined by the pole owner.[8] This clarification of the Commission's proposed rule appropriately places the burden on the prospective attacher to provide information required for each individual pole owner to engineer access requests; and in turn, exempts pole owners from performing within rigid and unreasonable time frames where circumstances beyond their control preclude the survey process from ever commencing.

Of further importance, the POWER Coalition submits that the Commission should refrain from imposing specific regulations or guidelines governing the substance of the permit application process.[9] As noted above, each individual pole owner must tailor its permit application requirements to fit the precise design of its network, and to gather the information needed to conduct an accurate survey of its poles. Because initial survey work is critical to ensuring that pole attachments are soundly engineered, each individual pole owner must maintain broad discretion to direct the content of its own permit application. Moreover, as demonstrated by the brief descriptions provided, the most common elements of the standard permit application are simple and straightforward; therefore, further streamlining by the Commission would not likely expedite the application process.

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[8] FNPRM at ¶ 35; *see also* FNPRM, Appendix B, proposed Rule 1.1420(b).

[9] *See* FNPRM at ¶ 37.

B. The Timeline Must Exempt Access Requests Involving Pole Replacements

As noted in the FNPRM, the Eleventh Circuit has held that Section 224 of the Act does not obligate utilities to replace poles that lack sufficient capacity to hold new attachments.[10] In addition, consistent with the determinations of certain state authorities, the Commission correctly acknowledged that make-ready work involving pole replacements requires more time than make-ready work on existing poles.[11] Accordingly, the Commission has no legal basis, and no practical justification to enforce its proposed timeline where the pole owner voluntarily replaces its pole to accommodate additional access requests.

For the avoidance of doubt, any rule adopted by the Commission must clearly exempt from the make-ready timeline all requests involving pole replacements.[12] Importantly, any application of the make-ready timeline to non-mandatory pole replacement projects would deter, rather than encourage, pole owners from expanding or upgrading their infrastructure to accommodate more attachments, as undertaking such projects would expose pole owners to new liabilities, including possible enforcement action and penalties, in the event work is delayed. The members of the POWER Coalition each have voluntarily replaced their poles in situations where access requests could not otherwise be granted, and such requests have been promptly completed, within negotiated time frames, and subject to reasonable terms agreed upon by the pole owner and the attacher.

C. The Pole Owner Must Be Permitted to Manage the Size and Scope of Access Requests

Consistent with the modified approaches taken by some state authorities, the Commission must maintain a flexible regulatory framework that would enable the pole owner to manage large

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10 FNPRM at ¶ 36 (citing *Southern Co. v. FCC*, 293 F.3d 1338, 1338 (11th Cir. 2002)).
11 FNPRM at ¶ 36.
12 FNPRM, Appendix B, proposed Rule 1.1420.

pole access requests within the time frames ordered for survey and make-ready work.[13] Because electric utilities differ significantly in terms of their respective geographic service areas, work force, and physical resources, the Commission must accord individual pole owners discretion to establish reasonable limitations on the number of pole attachment requests that will be completed within the access timeline. Where the pole owner has made diligent efforts to meet the demands of its attachers, the Commission must not sanction delays resulting from access requests beyond the size and scope of what the pole owner is equipped to manage.

The members of the POWER Coalition each have effectively balanced survey and make-ready work with their day-to-day business operations through establishing a maximum number of pole attachment requests that may be submitted per individual permit application. This maximum permit size is communicated to attachers during pole attachment agreement negotiations. For all requests exceeding this limitation,[14] an additional permit application is required; provided, however, that the attacher may designate the order in which permit applications are completed. Using this approach to manage large access requests by an individual attacher, the members of the POWER Coalition consistently have satisfied the business needs of their attachers in a timely manner.[15]

D. The Pole Owner Must Be Permitted to Suspend the Timeline if Unforeseen Events Interrupt Performance

As is expressly stated in Section 224 of the Act, and affirmed by the Commission's rules and orders, the obligation of electric utilities to provide access to pole attachments is, under all circumstances, subject to the considerations of safety, reliability, and sound engineering of their

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13 *See* FNPRM at ¶¶ 47-50.

14 The Joint Commenters have observed that most access requests do not exceed the maximum number of pole attachments allowed per application, except where the attacher is entering a new service area, at which time the pole owner and the attacher negotiate reasonable time frames to facilitate the attacher's proposed build-out.

15 Although rare, attachers have requested permits for attachments to *thousands* of poles. In particular, Dominion once received a permit application from a single attacher seeking access to approximately 6,000 poles.

electric distribution infrastructure.[16] Therefore, any rule establishing firm time frames for access to pole attachments must also permit electric utilities to toll or suspend any survey or make-ready deadlines, at their sole discretion, where unforeseen events demand that resources be diverted to resolving network emergencies.[17] The POWER Coalition submits that the types of events likely to interrupt their performance of pole attachment requests include, but are not limited to: extended system-wide outages;[18] multiple, frequent short-term or local outages;[19] *force majeure* events, including work stoppages; and significant damage to infrastructure.[20]

Where an electric utility determines that it must suspend survey or make-ready work, as may be needed to mitigate any threat to the safety, reliability, or sound engineering of its electric distribution infrastructure, the Commission should require nothing more than reasonable notice to attachers of the intervening event, and the approximate duration for which work on attachment requests was interrupted.[21] Importantly, neither the Commission nor any affected attacher should be entitled to "second guess" the decision of an electric utility to divert its resources and workers from pole access projects to emergency response, through any enforcement or formal complaint process. To the extent electric utilities provide reasonable notification to their attachers that an

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16 47 U.S.C. § 224(f)(2). *See also* FNPRM ¶ 18 and n. 66.

17 In some states, such as Texas, disaster relief priorities are established by law. Thus, without broad discretion to divert its resources from pole attachment projects to fulfilling its disaster relief obligations, companies such as CenterPoint could run afoul of state law as the result of its efforts to complete pole attachment requests within the Commission's proposed access timeline.

18 For example, in 2008, following Hurricane Ike, CenterPoint and Ameren each reported re-deploying substantial numbers of workers, and substantial physical resources, for periods extending beyond thirty (30) days. Dominion experienced similar demands on its resources following the impact of Hurricane Isabel in 2003, as well as other named storms affecting the East coast.

19 During the summer months, Dominion typically is forced to make frequent, short-term shifts in its resources, as needed to resolve local outages resulting from severe thunderstorms. Dominion experiences similar resource demands during the winter months, due to ice and snow storms.

20 Electric utilities must immediately divert resources to repairing damaged infrastructure that presents public safety risks; for example, where live cables have fallen.

21 Upon individual request, the Joint Commenters would be amenable to providing additional detail regarding the impact of an event on any specific pole attachment application. However, following an emergency situation, it would be impractical for the electrical utility to provide an individualized notification to each attacher having an application in queue.

unforeseen event has interrupted work on pole attachment requests, the Commission's proposed rule must expressly excuse delays consistent with the reported event.

E. The Timeline Should Not Encompass Coordination Among New and Existing Attachers

The Commission should not obligate the pole owner to manage the relationship between a new attacher, and any existing attachers present on its pole. At bottom, the pole owner has no effective means to remove or relocate an existing attachment, other than to undertake the substantial burdens, liabilities, and expenses of completing such work where an existing attacher does not cooperate with its make-ready procedures. As discussed more fully below, the Commission's proposed "self-help" measures do not offer the pole owner any feasible solution. As the FNPRM correctly observes,[22] existing attachers have strong disincentives to facilitate pole access by other attachers, that tend to provide competing voice, Internet, and video services. In adopting rules that would hold the pole owner responsible for failing to coordinate new and existing attachers, the Commission would enhance, rather than minimize, such disincentives.

Under the Commission's proposed Rule 1.1420(d), the pole owner should be required to do nothing more than provide notice to existing attachers of the new attachment and the date set for the anticipated completion of the make-ready work.[23] In turn, such notice should suspend the forty-five (45) day time frame within which the pole owner is expected to complete make-ready work, until all existing attachers have fully complied with their respective obligations to remove or relocate their attachments, as needed to accommodate the pole attachment request. Where the make-ready deadline established by the pole owner must be postponed by more than thirty (30)

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[22] FNPRM at ¶ 41.

[23] *See* FNPRM, Appendix B, proposed Rule 1.1420; FNPRM at ¶ 40.

days due to inaction of one or more existing attachers, those attachers must be liable for resulting penalties, or any damages sought by the new attacher.[24]

Existing attachers can be more than slow in removing or relocating their facilities, and in fact, are sometimes belligerent in their refusal to do so. For example, in *Wedgewood Associates, LLC v. Virginia Electric and Power Company* (Circuit Court of the City of Virginia Beach, Case No. CL08003418-00), involving a dispute among a real estate developer, Comcast Cable, and Verizon, Dominion relocated its poles and power facilities, and Comcast then relocated its lines. Verizon, however, relying on its state tariff and joint use agreement, refused to relocate its lines. In fact, Verizon informed Dominion that any attempt by Dominion to relocate Verizon's facilities on their jointly-used poles would subject Dominion to a suit for legal remedies, injunctive relief, and treble damages. Only after protracted litigation and expense was the matter resolved.

The "self-help" remedies available to pole owners under the current Rule 1.1403(b) simply provide no practical means for pole owners to facilitate coordination between new and existing attachers.[25] Although the Commission may authorize pole owners to remove or relocate existing attachments, as needed to complete make-ready work, the Commission cannot mitigate other substantial liabilities to which pole owners may be exposed in resorting to such "self-help" remedies. In practice, the members of the POWER Coalition tend to avoid removing or relocating attachments without the express permission of the attacher, based on their concerns that doing so could result in loss of service to the attacher's communications customers, or

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[24] *See* FNPRM ¶ 43. To the extent existing attachers cooperate in the make-ready process, the Joint Commenters agree that the thirty (30) day time frame proposed by the Commission would be sufficient for multiple attachers to coordinate amongst themselves. However, the pole owner should not be held responsible for delays resulting from the actions (or inaction) of existing attachers.

[25] *See* FNPRM at ¶ 40 (reiterating that the utility, its agent, or any new attacher is permitted to move, rearrange, or remove any facilities that impede make-ready work in the event those facilities are not removed or modified by the existing attacher upon notice from pole owner).

damage to the attachment.[26] The time frames imposed by the Commission to coordinate new and existing attachers, if any, should not force pole owners to choose between non-compliance and unsound business practice.

III. THE COMMISSION SHOULD NOT IMPOSE A TIMELINE FOR ACCESS TO WIRELESS POLE ATTACHMENTS

The record before the Commission in this proceeding does not support that imposing firm time frames for the stages of make-ready work performed to enable wireless attachments would, in any way, expedite pole access for providers of wireless services. Despite numerous demands for more robust Commission regulation of access to wireless attachments, no wireless service provider has availed itself of the Commission's formal complaint procedures to resolve any real-time dispute involving alleged delays in the make-ready process.[27] Absent any demonstrated need for Commission oversight of the relationships between pole owners and wireless attachers, the POWER Coalition submits that the Commission should preserve the status quo of negotiated access arrangements. However, if the Commission should decide to adopt an timeline for access to wireless attachments, any such timeline must reflect the substantial differences between those attachments and the wired attachments used by cable and telecommunications service providers.

As EEI/UTC and several electric utilities already have demonstrated in this proceeding, wireless attachments present complex engineering, safety, and reliability concerns that demand

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[26] In an extreme example, Rapid Communications, LLC, a cable company, made thousands of attachments to poles owned by Ameren in Missouri and Illinois. Rapid subsequently defaulted on its pole rents and abandoned its facilities without notice to Ameren. Ameren could not take the risk of simply removing the attachments from its poles, and in so doing, depriving Rapid's customers of service. Therefore, Ameren obtained a default judgment in United States District Court for the Central District of Illinois (Springfield Division), granting Ameren ownership of the cable attachments and allowing Ameren to take any necessary action regarding the attachments while a purchaser is sought. (Civil Action No.: 10-3031, Default Judgment entered May 18, 2010). Even so, Rapid's purported successor, Crystal Broadband Networks, threatened litigation against Ameren, and Ameren is still owed nearly $200,000.00.

[27] Indeed, the only formal complaint ever filed with the Commission by a wireless service provider was in the case of *Omnipoint v. PECO*, 18 FCC Rcd 5484 (Enforcement Bureau, 2000), pertaining to the applicable annual rate for wireless attachments.

additional time and special expertise during the make-ready process.[28] Nevertheless, despite the unique challenges of accommodating pole access requests by wireless service providers, each of the POWER Coalition members has negotiated mutually agreeable rates, terms, and conditions for wireless attachments, including reasonable time frames for completion of survey and make-ready work.[29] Accordingly, the POWER Coalition submits that any Commission-imposed timeline for access to wireless attachments would do nothing more than disrupt existing, amicable access arrangements reflecting the appropriate balance between the safety, reliability, and engineering concerns of the pole owner, and the business needs of the wireless attacher.

IV. ELECTRIC UTILITIES MUST BE ENTITLED TO AFFIRMATIVELY APPROVE ALL CONTRACTORS HIRED TO PERFORM MAKE-READY WORK

The Commission's proposed Rule 1.1421(f) appropriately provides that an attacher shall be permitted to hire an outside contractor to perform make-ready work only if the pole owner has failed to perform such work within the access time frames prescribed by the Commission.[30] The members of the POWER Coalition do not object to the use of outside contractors under these rare circumstances; provided, however, that the attacher must be required to hire only those contractors selected and affirmatively authorized by the pole owner for the specific make-ready project demanded. Upon request by the attacher, the members of the POWER Coalition would be amenable to providing one or more referrals to outside contractors that it deems suitable to complete the make-ready work needed to grant access to its pole.

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28 FNPRM at ¶ 52, n. 154.

29 As a general matter, CenterPoint adheres to the same time frames for survey and make-ready work as it offers to cable and telecommunications attachers. By contrast, Ameren and Dominion have negotiated individual arrangements, based on the number, location(s), and engineering design of proposed wireless attachments. In fact, Dominion posts pole access information relevant to prospective wireless attachers on its website, at http://dom.com/business/collocation/electric-distribution-pole-attachments.jsp.

30 *See* FNPRM, Appendix B, proposed Rule 1.1420(f). Importantly, any determination of whether the pole owner has complied with the Commission's access timeline must account for all time periods during which the access timeline was lawfully tolled or suspended by the pole owner, as discussed more fully in Section II above.

Because the make-ready process involves work that directly impacts the safety, reliability, and engineering of electric distribution facilities,[31] the POWER Coalition members select contractors based not only on objective qualifications, but also on subjective criteria and performance evaluations that are not public record. Therefore, the POWER Coalition strongly opposes the Commission's proposed Rule 1.1422(b), that would mandate electric utilities to make available to attachers the criteria and procedures for becoming an authorized contractor.[32] Similarly, the Commission also should not establish any presumption that an independent contractor is qualified to perform any specific make-ready work based solely on the contractor's credentials, or the referrals of electric utilities other than the pole owner.[33]

Of paramount importance, under no circumstances should any electric utility be obligated to permit any outside contractor to perform make-ready work among the electric lines. Because such work demands an extraordinary level of skill, each of the POWER Coalition members mandates that its "linemen" complete an extensive, multi-year training program covering its network specific protocols, including switching protocols that must be supervised by qualified employees.[34] In fact, CenterPoint's internal policies do not permit any outside contractor to perform work among the electric lines – even for its own operational purposes. Accordingly, the Commission should not adopt its proposed Rule 1.1424.[35]

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31 The photographs produced by CenterPoint as *Exhibit A* illustrate some of the hazardous conditions that have resulted from the workmanship of unauthorized contractors employed by CenterPoint's attachers.

32 FNPRM, Appendix B, proposed Rule 1.1422(b).

33 *See* FNPRM at ¶ 64.

34 For example, Ameren's training materials for linemen include on three-inch binder, two two-inch binders, and two half-inch spiral manuals. It takes three (3) years to become a journeyman lineman for Ameren. This includes classroom time, as well as apprentice time in the field. Each apprentice goes through a three-stage training program, each stage representing a year of training.

35 *See* FNPRM, Appendix B, proposed Rule 1.1424; FNPRM ¶ 69.

V. USE OF PARTICULAR ATTACHMENT DEVICES AND TECHNIQUES

"Boxing" – the practice of installing lines on both sides of the same pole at approximately the same height – and "bracketing" – the practice of installing an extension arm on a pole to support additional lines at the same level as existing lines – are two controversial attachment devices and techniques.[36] In access agreement negotiations, attaching entities want *carte blanche* to employ these techniques because they believe such techniques expedite deployment of their lines in the near term. Pole owning utilities seek to restrict or prohibit these techniques because in the long term they impede climbing access to the electric lines that are installed above the attacher's lines on the poles and because they impede pole replacement.

In the Order in this proceeding, adopted May 20, 2010, the Commission held that "...utilities must allow attachers to use the same attachment techniques that the utility itself uses in similar circumstances, although utilities retain the right to limit their use when necessary to ensure safety, reliability and sound engineering."[37] It is the "although" clause of this holding that is the subject of the FNPRM. The "although" clause is "carefully tailored to reflect the legitimate needs of pole owners...our commitment to ensuring this form of nondiscriminatory access is limited by the utility's existing practices."[38] The FNPRM seeks comment on "additional considerations" applicable to the use of boxing and bracketing, including the circumstances under which a pole owner will allow or prohibit such techniques, the bases for the relevant decisions of the pole owner, and the protocol for communicating pole owners' policies and decisions to attachers.[39]

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[36] *See* FNPRM at n. 35-36.
[37] FNPRM at ¶ 9.
[38] FNPRM at ¶ 11.
[39] FNPRM at ¶ 13.

A. Utility Discretion Is Critical

The Commission's proposals with regard to attachment techniques ultimately turn on its head the common sense approach to ensuring the safety and reliability of critical infrastructure. It should not be the burden of the pole owner to establish prospectively, systematically, and generically all situations where boxing and bracketing are allowed, but rather the burden of the proponent of these techniques to show in any particular instance that their use of them is safe, reliable, and completely consistent with the utility's own use.

Attachment techniques that interfere with climbing the pole or replacing the pole must be subject to the discretion of the pole-owning utility to limit or disallow. Despite the common use of bucket trucks to lift a lineman to the work space on a pole, the necessity to climb a pole nonetheless frequently arises. For example, the pole may not be installed along a roadway. Or the pole may exceed the working height of the crew's bucket truck.

To illustrate the pole-climbing problems that can be caused by the use of these non-standard devices and construction techniques, the POWER Coalition is incorporating herein for the record a video that has been produced by Dominion, and still shots from the video.[40] The video and still shots demonstrate problems that can be caused by boxing and bracketing when the pole climber is using the "buck squeeze" fall restraining climbing method that is becoming the industry standard for safe pole climbing.

The decision whether to allow boxing, bracketing, or other non-standard construction techniques is highly fact specific, and turns not so much on whether the utility itself has ever used either technique at some place or at some time on its poles as it does on the circumstances surrounding any particular request for the use of one of these techniques. However, the shortcoming of requiring the utility to determine and publish in advance the circumstances under

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[40] *See* http://www.eckertseamans.com/practiceAreas.aspx?PracticeGroupID=86&View=PracticeGroup, and *Exhibit B*.

which boxing and bracketing (or other attachment techniques) may or may not be allowed is that it is simply not possible to anticipate every possible circumstance. The pole owner should not have to risk a complaint for denying the use of boxing or bracketing simply because it failed to anticipate the circumstances of a particular request that compel it to deny that request.

On the other hand, the POWER Coalition understands that there needs to be some means of understanding the principles that the utility will use in evaluating a request for use of one of these techniques. These principles can and should be communicated to the attaching entity directly or published on a pole attachment section of the utility's web site, if the utility maintains such a section.[41] Each of the POWER Coalition members maintains construction standards and practices that are distributed to attaching entities and updated from time to time. This would be the ideal way to communicate the principles and perhaps provide examples of instances where boxing and bracketing and other attachment techniques have been allowed or disallowed, and the reasons why in those instances.

The important point is that these principles and examples can only provide guidance to attaching entities. They cannot be considered hard-and-fast rules by which the utility must abide. In the final analysis, the utility must have the discretion to allow or disallow the use of any attachment technique. The POWER Coalition agrees, however, that the reasons for the pole owner's decision should always be communicated to the attacher, and in so doing, that decision, and the reason therefor, necessarily become public.

B. Utility Permissible Attachment Practices Do Not So Much Change As Evolve Over Time

The Commission's inquiry suggests that the Commission believes that there may come points in time when a utility will change its attachment policies. The POWER Coalition

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[41] *See, e.g.*, CenterPoint Energy's pole attachment information website here: http://www.centerpointenergy.com/services/andmore/poleattachments/

suggests, rather, that the process is more like continual evolution. A practice that almost never would be approved, under some circumstances, may become acceptable. For example, although Ameren historically has prohibited boxing and bracketing, Ameren allowed the use of an extension arm on one occasion, where a power riser on a pole prevented installation of a normal attachment. As instances of approval accumulate and are made known to attachers – and decisions allowing a normally prohibited technique should be communicated to or made available in some way to all attaching entities – all concerned will gain an understanding of when non-standard construction techniques can be expected to be approved or at least given consideration.

VI. COMPILATION AND PUBLICATION OF A PRICE LIST FOR COMMON MAKE-READY TASKS.

The FNPRM proposes to standardize and commoditize a schedule of common make-ready charges, pursuant to the following new rule:

> **§1.1426 Charges for access and make-ready.**
>
> (a) Utilities shall make available to attaching entities a schedule of common make ready charges.
>
> (b) Payment for make-ready charges is due in the following increments:
>
> (1) payment of 50 percent of estimated charges requires the recipient utility to begin make-ready performance.
> (2) payment of 25 percent of estimated charges is due 22 days after the first payment.
> (3) payment of remaining make-ready charges is due when access is granted.

Although the Commission's goal is understandable, it is inconsistent with law, and contrary to the current working pragmatic approach that accounts for the everyday realities of infrastructure construction.

A. Payment in Stages Is Inconsistent with State Tariff Provisions

The proposed rule is problematic because each utility is unique and make-ready situations vary greatly. Because there are so many variations in circumstances, make-ready work has to be estimated for each job; make-ready jobs cannot be ordered off a rate schedule like a tariff. In addition, protecting the finances, resources, cash flow, and credit ratings of an electric utility is a delicate balance that is addressed and governed by state regulatory law in many ways. Indeed, public policy and the law so strongly safeguards this balance that when an electric customer requests a utility to do construction work to benefit the customer, utility tariffs routinely require payment in advance for the total estimated cost of requested construction. For example, Ameren's tariff provides:

> Facilities and Relocation Charges. In the presence of physical conflicts associated with any new construction or expansion of customer's premises or electrical load, Company may, at its sole discretion, upon customer's request, relocate any distribution facilities to a right-of-way acceptable to Company on or off customer's premises, **following the payment by customer of the Company's estimated net cost of relocating its distribution facilities**. The net relocation cost chargeable to customer may be offset in part by an amount not to exceed 50 percent (50%) of any net annual revenue estimated to be derived from customer's premises, and not utilized in meeting the Company's tariff provisions governing extensions to non-residential customers. (Emphasis added.)

Similarly, the CenterPoint tariff provides:

> 5.7.5 NON-STANDARD FACILITIES. Non-standard facilities are defined in Chapter 6, and may include but are not limited to a two-way feed, automatic and manual transfer switches, Delivery Service through more than one Point of Delivery, redundant facilities, facilities in excess of those normally required for Delivery Service, or facilities necessary to provide Delivery Service at a non-standard voltage. If the entity requesting Construction Service desires Delivery Service utilizing non-standard Delivery System facilities, as described above and not covered elsewhere in this Tariff, Company shall construct such facilities unless, in the reasonable judgment of Company, such

> construction would impair Company's facilities or facilities with which Company is interconnected, impair the proper operation of such facilities, impair service to Retail Customers, or there are other appropriate concerns that the entity requesting service is unable or unwilling to correct. **The entity requesting Construction Service shall pay to Company the estimated cost of all non-standard facilities**, offset by any applicable allowance, as detailed in Chapter 6, and the Facility Extension Agreement. (Emphasis added.)

The policy and circumstances involving communications attachers are no different. Electric utilities should not have to finance the costs of construction, and should not have to assume the risk of not being paid. Such situations are a reality, whether with the largest cable companies or with seemingly successful smaller, newer competitors.[42] A federal pay-as-you-go rule would be inconsistent with the state tariff approach, that requires estimated construction costs to be paid in full in advance, thereby eliminating the risk that non-payment for the work would be ultimately passed on to electric rate payers.

B. Utilities Should Publish Typical Charges, but not a Schedule of Charges

Publication of a fixed price schedule of charges, as proposed by the Commission, implies that a particular task will always cost a particular amount to complete, regardless of construction circumstances or nuances. The POWER Coalition agrees that, for planning purposes, pole owners should publish a general guideline stating the typical costs for common make-ready tasks. For an actual build, however, the installation site must be visited, and the actual costs for the particular circumstances must be estimated. This is the process that is in place today. Attachers are not required to agree to a make-ready project without knowing in advance the estimated total cost of the make-ready work.

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[42] For example, Charter Communications, one of the nation's largest cable operators, filed for bankruptcy protection in 2009. *See* "Huge Debt Prompting Bankruptcy of Charter," New York Times, February 12, 2009, available at http://www.nytimes.com/2009/02/13/business.13cable.html. It took Ameren and Dominion over one year to receive payment equal to pennies on the dollar for Charter's unpaid pole rents and make-ready debt. Similarly, the default of Rapid Communications has left Ameren with significant unpaid bills incurred by the cable company. *See supra* n. 26.

If utilities were required to publish a hard-and-fast schedule of charges, more problems would be created than solved. Who would decide if the utility's published charges are reasonable? What would happen in the inevitable instance that a required task is not on the schedule? What would the process be for changing the published charges?

It is simply not possible to compile a menu of every possible combination and permutation of make-ready tasks that might be required under the greatly varying circumstances encountered in the field. In an effort to follow the Commission's lead, the members of the POWER Coalition have attempted to identify the most common make-ready tasks. Those tasks are:

- Raise drip loops
- Install conduit riser
- Raise secondary/neutral electric line
- Resag electric lines
- Insulate down guys

The members of the POWER Coalition also worked to benchmark the costs of each of these tasks at a particular company. The cost of these tasks, however, can vary greatly, depending on the circumstances. For example, raising a drip loop may involve merely shortening a two conductor insulated wire – about a $250 task. It could, however, require raising an 8-foot light bracket and loop, which would roughly double the cost. If a 10-foot light bracket were involved, the cost would double again. In addition, these costs assume that the pole is accessible by bucket truck, and the work would be performed by two workers at regular time. If the pole must be climbed or if special engineering were required, the cost would increase.

A rule requiring utilities to publish a schedule of typical make-ready charges would result in a hodge-podge of tasks and charges that would differ significantly in scope from utility to utility. Moreover, because attachers' field employees quickly develop a working knowledge and

understanding of the make-ready activities specific to particular utilities, a general list of those activities and prices would provide little value. It is far better from both the attachers' and the pole-owners' point of view to continue with the present system of providing an estimate in advance of the cost of any particular project. If the Commission wants to give attaching entitles a planning tool, the rule should require publication of typical charges, *with no connotation that a utility cannot charge more or less than the typical charge and no connotation that a utility cannot charge for necessary tasks that were not shown on the list of typical charges.*

VII. THE COMMISSION LACKS AUTHORITY TO AWARD COMPENSATORY DAMAGES

The Commission's suggestion that it will award compensatory damages against pole owners for make-ready delays or attachment terms and conditions that cause consequential loss is both novel and problematic. First, the Commission has no statutory authority to assess compensatory damages. The unambiguous express language of Section 224 of the Act grants the Commission jurisdiction only over the "rates, terms and conditions" of pole attachments.[43] Nowhere does the Act mention sanctions, penalties, monetary awards, or forfeitures, much less money damages. The law is therefore clear that the Commission may not award damages because the statute does not authorize it to do so.[44]

In addition, even if the Commission believed it had the statutory authority to award damages, doing so without a jury trial would require it to wade deep and alone into uncharted waters. The Seventh Amendment to the United States Constitution guarantees the right to a trial by jury in all suits sounding in "common law" where the amount at controversy exceeds twenty

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[43] 47 U.S.C. § 224(b)(1).

[44] *See* 5 U.S.C. § 558(b) ("sanction may not be imposed ... except within jurisdiction delegated to the agency and as authorized by law"); *West v. Gibson*, 527 U.S. 212 (1999) (holding that the Equal Employment Opportunity Commission could award damages only because it was expressly authorized to so by statute).

dollars.[45] The United States Supreme Court addressed an aspect of the right to a jury trial in a proceeding before a federal administrative agency in *Atlas Roofing Company, Inc. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977). The *Atlas* Court held that "in cases in which 'public rights' are being litigated *e.g.*, cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact the Seventh Amendment does not prohibit Congress from assigning" the adjudication to an administrative agency without a jury.[46]

The Court expanded on the *Atlas* decision in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). While the Court's holding in *Granfinaceria* addressed a claim brought in a federal court by a Chapter 11 bankruptcy trustee against individual persons, the Court analyzed *Atlas* and its predecessors. It stated: "Unless a legal cause of action involves 'public rights,' Congress may not deprive parties litigating over such a right of the Seventh Amendment guarantee to a jury trial."[47] The Court explained that a "public right" did not necessarily require that a dispute "must at a minimum arise 'between the government and others.'"[48] Instead, "[t]he crucial question, in cases not involving the Federal Government, is whether 'Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.'"[49]

The Commission cannot establish in the first instance that Congress explicitly provided the authority to award compensatory damages. It certainly cannot establish that Congress exercised its Article I powers to create a private right inextricably linked to a regulatory scheme

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45 U.S. Const. amend. VII.
46 *Atlas Roofing Co. Inc.*, 430 U.S. at 450.
47 *Granfinanciera*, 492 U.S. at 53.
48 *Id.*, at 54 (internal citations omitted).
49 *Id.* (internal citations omitted).

intended to obviate a jury trial under the Seventh Amendment. The Commission should immediately abandon its effort to create by regulatory fiat a compensatory damages scheme.

VIII. REQUEST TO HOLD WORKSHOPS

At several places in the FNPRM,[50] the Commission cites to the experience of New York, Oregon, Utah, Vermont, and other states as models for proposed federal rules. The POWER Coalition notes, however, that the rules in most of those states emerged from extensive workshops where pole owners and attaching entities had an opportunity to participate, interact, and provide input to the state public utilities commissions.[51] The Commission should follow these examples of collaborative rulemaking. In Florida, when the Florida Public Service Commission was considering vital issues of infrastructure hardening and a sub-docket regarding the safety and engineering issues raised by pole attachments, that commission held two rule development workshops, and accepted post-workshop comments.[52]

The only workshop held by the National Broadband Plan staff relating to pole attachments took place on August 12, 2009, from 9:30 a.m. to 11:30 a.m. No electric utility pole owners were invited to participate. Consequently, in formulating the recommendations that have shaped the current rulemaking, the National Broadband Plan staff heard only that new regulations were needed in order to speed broadband deployment. They heard nothing about the practical difficulties that pole owners face is accommodating requests for immediate access and deployment for attached facilities.

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50 *See, e.g.*, FNPRM at ¶¶ 28, 32, 47, 48, 49, 50, 70, 95, 96, and n. 98.

51 *See, e.g.*, New York Case No. 03-M-0432, "Order Adopting Policy Statement on Pole Attachments," issued August 6, 2004, which notes that the proceeding followed a "collaborative process," including meetings held in May and July, 2003; Utah Docket No. 04-999-03, which included a series of "technical conferences" held during 2004 into 2005; and Oregon Order No. 07-137, entered April 10, 2007, which adopted permanent pole attachment rules in Dockets AR 506 and 510, following "several rounds of comments and several sessions of workshops."

52 Docket Nos. 060173-EU and 060172-EU.

The record shows that pole owners held extensive *ex parte* meetings with the National Broadband Plan staff and Commission staff regarding the practical problems associated with broadband access and deployment. Broadband providers made extensive *ex parte* presentations as well. But there have been no interactive collaborative meetings between stakeholders and the Commission staff. Moreover, there have been no opportunities for exchanges between pole owners and broadband providers in a public setting, no opportunities for collaboration, and no opportunities to build consensus on as many points as possible, as took place in the state pole attachment proceedings.

The POWER Coalition submits that the Commission would be farther ahead in the long run in coming up with workable regulations and policies if it held moderated workshops and other collaborative efforts to reach as much consensus as possible. Then the Commission could tackle only the issues where the industries were at an impasse. The POWER Coalition therefore requests that the Commission hold workshops on the issues raised in the FNPRM.

IX. CONCLUSION

The POWER Coalition respectfully submits that the Commission should adopt rules and policies governing pole attachments as described herein.

Respectfully submitted,

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